Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN MINING CONGRESS,
THE ALUMINUM ASSOCIATION, AND KENNECOTT,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND,
HAZARDOUS WASTE TREATMENT COUNCIL,
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY and LEE M. THOMAS, ADMINISTRATOR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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The Petition demonstrates that when Congress drafted the Bevill Amendment to cover "solid waste from the extraction, beneficiation, and processing of ores and minerals . . .," it meant what it said, namely that the Amendment includes all solid waste from the extraction, beneficiation, and processing of ores and minerals.[1] The Court of Appeals, however, modified

[1] Petition ("Pet.") at 10-16.

the mandate of Congress set forth in the plain language of the Bevill Amendment, holding that the Amendment covers all solid waste from the extraction and beneficiation of ores and minerals, but only "high volume, low hazard" solid waste from the processing of ores and minerals.[2]

It is significant that the response of the Environmental Protection Agency ("EPA" or "the Agency") does not assert that the appellate court's interpretation of the Bevill Amendment is correct, or even preferable. Instead, the most EPA says is that the Agency now "accept[s]" the court's interpretation.[3] EPA's eleventh-hour, reluctant acquiescence in the court's interpretation (after nine years of considering but not adopting this interpretation) is an additional reason why *certiorari* should be granted. EPA is now willing to assist in the judicial modification of the plainly expressed will of Congress even though the Agency is unwilling to state that the court's amendment of the statute is correct or even preferable.

Rather than defend the appellate court's conclusion that the Bevill Amendment covers all extraction and beneficiation wastes but only "high volume, low hazard" processing wastes, EPA instead raises whether "smelting and refining" wastes are "processing" wastes.[4] That issue was not decided below and is irrelevant here. On the issue actually raised by the Petition, the plain language enacted by Congress is clear: the Bevill Amendment covers all solid wastes from the processing of ores and minerals, just as it

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[2] Pet. at 10-14.

[3] EPA Brief in Opposition ("EPA Br. in Opp.") at 10.

[4] EPA Br. in Opp. at 9.

covers all solid wastes from the extraction and beneficiation of ores and minerals.[5]

The response of the Environmental Defense Fund and the Hazardous Waste Treatment Council (collectively "EDF") largely repeats the erroneous reasoning of the Court of Appeals.[6] However, EDF fails, as does the Court of Appeals and EPA, to explain why the express language of the Bevill Amendment covers all wastes from "extraction, beneficiation, and processing" if Congress intended the Amendment to cover all wastes from extraction and beneficiation, but only "high volume, low hazard" wastes from processing. That failure is especially significant because, as the Court of Appeals has correctly recognized, the Resource Conservation and Recovery Act ("RCRA") is a statute characterized by "definitional specificity of the first order."[7] Moreover, respondents do not address petitioners' demonstration that even if the appellate court is correct that the scope of the Bevill Amendment is limited to the "special waste" concept, that concept included all solid wastes from the processing of ores and minerals.[8]

Petitioners also demonstrated that the Court of Appeals' conclusion that the six wastes are not cov-

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[5] Additionally, EPA attempts to fault petitioners for not attacking the Court of Appeals' rejection of EPA's *Chevron* argument. *See* EPA Br. in Opp. at 9-10. A *Chevron* analysis is unnecessary where, as here, statutory language is unambiguous. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[6] *See* EDF Brief in Opposition ("EDF Br. in Opp.") at 7-8.

[7] *American Mining Congress v. Environmental Protection Agency*, 824 F.2d 1177, 1189 (D.C. Cir. 1987).

[8] *See* Pet. at 14-16.

ered by the Bevill Amendment violates the Administrative Procedure Act ("APA") and the principles of ripeness and primary jurisdiction because the court's sole basis for its conclusion was its factually erroneous assertion that EPA had previously "found" that these wastes are not "high volume, low hazard" wastes.[9] In fact, EPA has never made this finding, and in its response EPA does not claim otherwise. Instead, EPA tries to avoid the constitutional and statutory problems created by the lower court's decision by arguing that the Court of Appeals found as a matter of law that the six wastes are not "special waste" and are therefore outside the scope of the Bevill Amendment. This ploy misrepresents the lower court's reasoning and ignores the court's statement that the six wastes are not "high volume, low hazard" because EPA "found" that they were not.[10]

The problem with EDF's response on this issue is that EDF, like the Court of Appeals and EPA, cannot point to any final agency action finding that the six wastes are not "high volume, low hazard" processing wastes. EPA's response makes clear that EDF and the Court of Appeals are wrong when they assert that the Agency has found these wastes are not "high volume, low hazard."[11] In short, the finding by EPA

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[9] Pet. at 16-23.

[10] *See Environmental Defense Fund v. Environmental Protection Agency* ("*EDF v. EPA II*"), 852 F.2d 1316, 1330 (D.C. Cir. 1988); Pet. App. at 27a.

[11] EDF alludes to EPA's 1978 Federal Register notice, 43 Fed. Reg. 58,946; Pet. App. at 46a. However, this notice was only a proposal, and findings made in a rulemaking proposal are neither binding nor ripe for review. *See Public Citizen Health*

that is pivotal to the Court of Appeals' holding was simply never made.

EDF makes much of the fact that these six wastes may otherwise qualify as hazardous under the listing criteria for Subtitle C of RCRA.[12] This observation ignores the fact that the purpose of the Bevill Amendment is to require special study and review of extraction, beneficiation, and processing wastes that may qualify as hazardous under Subtitle C.[13] The fact that mining wastes, including these six wastes, might meet the Subtitle C listing criteria is precisely the reason Congress included them within the scope of the Bevill Amendment.

Finally, EDF suggests that this case is not worthy of review because it is limited to the fate of only six wastes.[14] That suggestion overlooks the broader consequences of the Court of Appeals' decision. The Court of Appeals has done more than amend the text and

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Research Group v. Commissioner, Food & Drug Administration, 740 F.2d 21 (D.C. Cir. 1984).

[12] *See* EDF Br. in Opp. at 8-10.

[13] *See Environmental Defense Fund v. Environmental Protection Agency*, 852 F.2d 1309, 1311-13 (D.C. Cir. 1988).

[14] *See* EDF Br. in Opp. at 7. Additionally, both respondents suggest that a writ of *certiorari* is unwarranted because there has not been a disagreement among the federal circuit courts on the issues raised in the Petition. However, as EDF recognizes, the United States Court of Appeals for the District of Columbia Circuit is the only court permitted by RCRA to review EPA regulations promulgated pursuant to that statute. *See* 42 U.S.C. § 6976(a). To deny review to a case involving the interpretation or implemention of RCRA because there is no division among the circuit courts would effectively deny Supreme Court review to all such cases.

plain meaning of the Bevill Amendment. The lower court's wrongful activism has also done more than deprive both EPA of its prerogative to determine whether the quantities and nature of the six wastes meet the court's new "high volume, low hazard" standard and petitioners of their right to participate in that Agency determination. The Court of Appeals has also ordered EPA to conduct an unnecessary rulemaking to determine the meaning of the "high volume, low hazard" standard and to decide which of the multitudes of other mining industry processing wastes meet that yet-to-be defined standard.[15] That new rulemaking odyssey, which EPA now expects will continue for an extended time, was surely not envisioned by Congress in 1980 when it instructed the Agency in the Bevill Amendment to study wastes from the "extraction, beneficiation, and processing of ores and minerals" and to make a regulatory determination regarding the most appropriate form of regulation for those wastes. Neither that rulemaking exercise, and the attendant substantial expenditure of time and money by government and industry, nor the outcome in the court below is called for by the plain language or legislative history of the Bevill Amendment.

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[15] *See EDF v. EPA II*, 852 F.2d at 1331.

Respectfully submitted,

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